

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Dakota Access, LLC	)	Docket No. 14-0754
	)	
Application Pursuant to Section 15-401 of the	)	
Common Carrier by Pipeline Law and	)	
Sections 8-503 and 8-509 of the Public Utilities Act	)	
for a Certificate in Good Standing and Related	)	
Authority to Construct and Operate a Petroleum	)	
Pipeline as a Common Carrier Pipeline and	)	
When Necessary to take Private Property	)	
as provided by the Law of Eminent Domain	)	

**REPLY BRIEF OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“Commission” or “ICC”) (83 Ill. Adm. Code 200.800), respectfully submits this Reply Brief (“RB”) in the instant proceeding. The fact that the RB may not have addressed every argument raised in the initial briefs should not be interpreted as a concession. In the interest of brevity, Staff has not raised and repeated every argument and response previously addressed in Staff’s IB. Thus, any omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff’s IB because further or additional comment is neither needed nor warranted. Staff maintains the positions it has taken in its initial briefs and in Staff testimony already filed and offers the following response to the initial briefs filed in

this proceeding.

## **I. Introduction and Procedural History**

On December 22, 2014, Dakota Access, LLC (“Dakota Access” or “Company”) filed an application (“Application” or Petition”) for the issuance to it of a Certificate in Good Standing (“Certificate”) pursuant to Section 15-401(a) of the Public Utilities Act (“Act”) addressing Common Carriers by Pipeline (220 ILCS 5/15-401(a)) and, pursuant to Section 15-401(d) of the Act addressing Common Carriers by Pipeline and, to Section 8-503 (220 ILCS 5/8-503) and Section 8-509 (220 ILCS 5/8-509) of the Act, respectively, the entry of an order (i) authorizing Dakota Access to construct, install, operate, and maintain the Illinois portion of the Dakota Access Pipeline, to be comprised of approximately 180 miles of new 30-inch outside diameter crude oil pipeline from a point near Hamilton, Illinois, on the Iowa/Illinois State line in Hancock County, Illinois, and extending southeasterly for approximately 180 miles to a point near Patoka, Marion County, Illinois, where the pipeline will connect with several of the existing tank farms located near Patoka, Illinois, and with the proposed pipeline of Energy Transfer Crude Oil Company, LLC (“ETCO”), as shown more specifically in Exhibits E and F to the Application,<sup>1</sup> and (ii) to acquire easements and other land rights for the construction of the Dakota Access Pipeline in Illinois by the use of eminent domain if and as necessary. (Application, 1.)

The following parties have intervened in this proceeding: William J. Klingele; Jane M. Veith, Julia A. Veith, Elizabeth J. Veith (“Veith Parties”); Evelyn Thomas; Carole A. Sairin; O.L. Behymer, Wilma Behymer, Tamara Behymer, and Terry Behymer (“Behymer Parties”); Andrew M. Ray and Julie J. Radel (“Ray Parties”); Kathleen A. Kingele and

Mary K Kingele-Ahmed (“Kingele Parties”); MCPO; Terrance J. Markert; Donald A. and Mary C. Fry; Glen Koch and Alan Kock (“Koch Parties”); Robert E. Koch; Ann Burns Hendrick; Cellular Properties, Inc. and Tower Reality Corp.; Hancock/Adams County Property Owners (“HAPO”); Illinois Agricultural Association; Scott County Property Owners; Oelze Equipment Company, L.L.C.; LIUNA local Unions; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“United Association”); International Brotherhood of Electrical Workers, Local 702, ALL-CIO (“IBEW Local 702”); Midwest Alliance for Infrastructure Now (“MAIN”); P. Patrick Poepping; Thomas A. Anderson; Bob Fitzsimmons; National Association of Manufacturers (“NAM”); 60 Plus Association, Inc.; Andy Patton; Illinois State Grange; International Brotherhood of Teamsters; Justus S. Templeton, III; Lt. Col. (Ret.) Eric Phillipson; and Tabitha F. Tripp.

On February 18, 2015, the ALJ set the procedural schedule in this docket. Pursuant to that schedule, Staff and other parties filed testimony in this proceeding. An evidentiary hearing was held on September 1, 2015. Staff Witness Mark Maple testified and evidence was admitted into the record, and the proceeding was continued generally. (Tr., 138:10, Sept. 1, 2015.)

Pursuant to the briefing schedule set on September 1, 2015, Staff provided its Initial Brief (“IB”) on October 1, 2015. (Tr. 137:5-6, 9-11, Sept. 1, 2015.) The Midwest Alliance for Infrastructure Now Coalition, 60 Plus Association and National Association of Manufacturers; the Illinois Agriculture Association and SP Group; Dakota Access, LLC; and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO also filed Initial Briefs

on October 1, 2015. Staff herein provides this Reply Brief.

This case has a statutory deadline for Commission action of December 22, 2015. 220 ILCS 5/8-14-501(e).

## **II. Description of Project and Relief Requested**

As stated above and in Staff's IB, Dakota Access has requested that the Commission grant it a Certificate to operate as a common carrier pursuant to Section 15-401 of the Act addressing Common Carriers by Pipeline (220 ILCS 5/15-401). Staff IB, 3. Dakota Access has also requested that the Commission enter an order pursuant to Section 8-503 (220 ILCS 5/8-503) and 8-509 (220 ILCS 5/8-509) of the Act authorizing the Company (i) to construct, install, operate and maintain approximately 180 miles of new 30-inch diameter pipeline from a point near Hamilton, Illinois to a point near Patoka, Illinois, where the pipeline will connect with existing tank farms in the area and also connect to the proposed pipeline of ETCO, and (ii) to acquire easements and other land rights for the construction of the Dakota Access Pipeline in Illinois by the use of eminent domain if and as necessary. (Application, 1.) The 180 miles of pipeline in Illinois will be part of one continuous pipeline, the Dakota Access Pipeline project ("Project"), of approximately 1,134-mile length that will originate near Stanley, North Dakota and terminate near Patoka, Illinois. (Dakota Access Exhibit ("Exhibit" or Ex.") 2.0, 4) Additionally, Dakota Access asks that the Commission grant it authority to exercise the power of eminent domain to acquire permanent easements of 50 feet in width, as well as temporary construction workspace easements, pursuant to Section 8-509 of the Act.

### **III. Statutory Provisions**

Section 15-401 of the Common Carrier by Pipeline Law states in pertinent part:

- (a) No person shall operate as a common carrier by pipeline unless the person possesses a certificate in good standing authorizing it to operate as a common carrier by pipeline. No person shall begin or continue construction of a pipeline or other facility, other than the repair or replacement of an existing pipeline or facility, for use in operations as a common carrier by pipeline unless the person possesses a certificate in good standing.

220 ILCS 5/15-401(a).

- (b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed: a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. . .

220 ILCS 5/15-401(b).

- (c) An application filed pursuant to this Section may request either that the Commission review and approve a specific route for a pipeline, or that the Commission review and approve a project route width that identifies the areas in which the pipeline would be located, with such width ranging from the minimum width required for a pipeline right-of-way up to 500 feet in width.

220 ILCS 5/15-401(c).

- (d) A common carrier by pipeline may request any other approvals as may be needed from the Commission for completion of the pipeline under Article VIII or any other Article or Section of this Act at the same time, and as part of the same application, as its request for a certificate of good standing under this Section.

220 ILCS 5/15-401(d).

(e) The Commission shall make its determination on any application filed pursuant to this Section and issue its final order **within one year** after the date that the application is filed unless an extension is granted. . . .

220 ILCS 5/15-401(e) (emphasis added).

Section 8-503 of the Act (order to construct), states in part:

Whenever the Commission, after a hearing, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any 2 or more public utilities are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected at the location, in the manner and within the time specified in said order; provided, however, that the Commission shall have no authority to order the construction, addition or extension of any electric generating plant unless the public utility requests a certificate for the construction of the plant pursuant to Section 8-406 and in conjunction with such request also requests the entry of an order under this Section.

220 ILCS 5/8-503.

Section 8-509 of the Act states in part:

When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

220 ILCS 5/8-509.



**IV. Fit, Willing and Able****V. Public Need/Public Convenience and Necessity****VI. Proposed Route of the Pipeline and Requested Easement Widths****VII. Section 8-503 of the Public Utilities Act****VIII. Section 8-509 of the Public Utilities Act – Eminent Domain**

The Illinois Agricultural Association (“Farm Bureau”) and the landowner intervenors represented by Shay Phillips, Ltd. (the “SP Group”) argue that the request for eminent domain is premature, Joint IB, 7. In so doing, they state that the Common Carrier by Pipeline Law does not contain provisions regarding the authority to use eminent domain. Joint IB, 5. That is not entirely correct. The law contemplates consolidated applications and consolidated consideration of such matters. In Section 15-401(d) of the Act addressing Common Carriers by Pipeline, 220 ILCS 5/15-401(d), the law states:

A common carrier by pipeline may request any other approvals as may be needed from the Commission for completion of the pipeline under Article VIII or any other Article or Section of this Act at the same time, and as part of the same application, as its request for a certificate of good standing under this Section. . . . If a consolidated application is submitted, then the requests **shall be heard on a consolidated basis and a decision on all issues shall be entered within the time frames** stated in subsection (e) of this Section.

*Id.* (emphasis added).

Here, as pointed out in the Staff IB, the Company filed a consolidated application requesting authorization under Section 8-509 pursuant to Section 15-401(d). While that authorization is not automatic, and the same criteria must be met by the applicant as a separate Section 8-509 application, the evidence in the record supports such authorization on the condition that Dakota Access is able to obtain a Certificate in this

docket. Staff Ex. 1.0, 25; Staff IB, 20-24.

Without acknowledging this time constraint in the statute, the Farm Bureau and SP Group argue instead essentially that one of the landowners, Mr. Klingele, doesn't really feel obligated to negotiate or consult an attorney until Dakota Access obtains approval for the pipeline and the route by the Commission. Joint IB, 7. Again, as Section 15-401(d) sets forth, the applicant in this case has a statutory right to file these on a consolidated basis, and when that approach is taken, the Commission "shall be heard on a consolidated basis and a decision on all issues shall be entered within the time frames stated. . ." 220 ILCS 5/15-401(d). The Farm Bureau and SP Group have not refuted this fact.

It is not uncommon for the Commission to take different procedural approaches for implementing Section 8-509 authorizations relating to different types of projects. In fact, the statute requires it. *Id.* If a public utility seeks relief under Section 8-509 after the Commission enters its order in a Section 8-406.1 expedited high voltage electric transmission line proceeding, for example, the Commission must issue its order within 45 days after the utility files its Section 8-509 petition. 220 ILCS 5/8-509. The Farm Bureau and SP Group did not raise that particular approach to electric transmission line eminent domain assessments in requesting such comparable treatment. Similarly, and as pointed out above, the legislature has contemplated a particular approach for oil pipeline cases. Whether the Commission agrees or disagrees with arguments preferring other approaches to implementation, the Commission must still carry out its obligation under the law.

Even in standard electric transmission siting cases under Section 8-406, however,

Section 8-509 eminent domain authority may be addressed on a consolidated basis. *MidAmerican Energy Company*, Final Order, Docket No. 14-0494, 17 (September 16, 2015) (eminent domain authority granted where Company met requirements under Section 8-406 and 8-509). So it is simply inaccurate to suggest that it is not appropriate or somehow unusual to do so here, on the condition that all the applicable requirements are met.

The Farm Bureau and SP Group also point to other dockets, one of which is another oil pipeline proceeding, as apparent support for the proposition that the Commission should not consider granting Section 8-509 authorization concurrently with a Section 15-401 application. See Joint IB, 9. Even with respect to the oil pipeline case, however, these parties cite to that proceeding out of context. Tr. 118:13-19; 119:1-2 (Sept. 1, 2015.) In that particular case, while the request for eminent domain authorization pursuant to Section 8-509 was filed concurrently with the Section 15-401 application, the question of good faith negotiations was actually at issue there. In finding that the record did not support a finding that authorizing the applicant “to take or damage private property in the manner provided for by the law of eminent domain” is necessary for the construction of the pipeline, the Commission stated:

. . . the instant case is somewhat unique in several respects, including the very large number of affected parcels, landowners and formal Intervenor; uncertainties over the status of existing easements on a large portion of the proposed line’s route; and the adversarial relationship that appears to exist between Petitioner and many landowners or their representatives, who view various actions and rhetoric by some representatives of Petitioner as disrespectful and counter-productive. All things considered, it is not particularly surprising that the negotiations to date have been somewhat unproductive.

*Enbridge Pipelines (Illinois), L.L.C.*, Final Order, ICC Docket No. 07-0446, at 68 (July 8, 2009).

There are no such similar facts in evidence in this case. Staff Ex. 1.0, 16; Tr. 101-102 (Sept. 1, 2015). Rather, the record here supports Section 8-509 authorization on the condition that Dakota Access is able to obtain a Certificate in this docket. Staff Ex. 1.0, 25; Staff IB, 20-24.

Nevertheless, the Farm Bureau and SP Group state that “it’s unreasonable to require landowners to enter into easements for a project that hasn’t been approved by this Commission.” Joint IB, 11. The fear of being forced into an easement agreement before the route is approved, however, is unfounded. In a consolidated proceeding, the Section 8-509 authorizations would only be granted to the extent that the other certification and Section 8-503 requirements have been met. The Commission does not grant eminent domain authorization for a common carrier by pipeline without the Certificate of Good Standing and a showing of the project being necessary to construct pursuant to Section 8-503, nor has the applicant here even made such a request. Indeed, the courts would not allow it. The Illinois Appellate Court, Third District, has said that “[w]ithout proof that the statutory prerequisites of the Pipeline Law have been met, certification and condemnation authority will not follow. *Lakehead Pipeline Co. v. ICC*, 296 Ill.App.3d 942, at 952, P 7 (1998).

Moreover, the Commission will still assess whether the Section 8-509 requirements have been met. In particular, the Company must still establish, among other things, that proper negotiations have taken place with landowners and whether the construction of facilities is necessary. Staff Ex. 1.0, 16, 20-21; Tr. 101-102 (Sept. 1, 2015.); *Ameren Illinois Co. d/b/a Ameren Illinois*, 2014 WL 7225109, Order, Docket No. 14-0652, slip op., at 17 (Dec. 10, 2014) (reasonable attempts to negotiate and landowner

contacts are among the considerations in assessing good faith negotiations). This is no different from other standard Section 8-509 proceedings and should provide some assurance regarding any concerns surrounding procedure.

Further, the Farm Bureau and SP Group argue that the evidence itself does not support the granting of eminent domain authority. Joint IB, 9. To the contrary, this argument, raised for the first time in their Joint IB, is not supported. There is no evidence in the record that suggests that the authority should not be granted if other requirements are met. Staff Ex. 1.0, 16; Tr. 101-102 (Sept. 1, 2015.) Neither they, nor any other party, alleged in testimony that the Company has negotiated in bad faith or even that they have failed to negotiate in good faith. *Id.*

A single landowner testifying that he is not interested in dealing with negotiating an easement for the pipeline (Joint IB, 7) is not sufficient to suggest that the Company has not acted in good faith negotiations. Staff Ex. 1.0, 16, 20-21; Tr. 101-102 (Sept. 1, 2015.); *See Ameren Illinois Co. d/b/a Ameren Illinois*, 2014 WL 7225109, Order, Docket No. 14-0652 (Dec. 10, 2014). While the Company must make every effort to answer landowner questions about the necessity of the rights, such as ingress and egress, which it seeks to acquire, it is equally important that landowners actively participate in the process, raising their concerns in a timely manner so that they may be addressed. *Id.*, slip op. at 17. No such landowner concerns have been raised in this docket.

Indeed, as Dakota Access pointed out in its initial brief, Mr. Klingele is not harmed or impacted by the granting of easement authority here. He does not own property in the project path, the Company is not attempting to acquire an easement on Mr. Klingele's properties, and Dakota Access does not foresee any future route modifications that

would bring the route onto his properties. Dakota Access IB, 55; Dakota Access Ex. 2.17, 3; Dakota Access 5.6, 5-6. As such, it does not appear that the Company has any current negotiations or anticipates any future negotiations with Mr. Klingele regarding the project at issue. *Id.* His testimony and the surrounding arguments should be considered in that context.

In fact, rather than submit any evidence of failure to act in good faith during negotiations, the Farm Bureau and SP Group instead attempt to build their case through Staff Witness Mr. Maple. Joint IB, 8-10. This is misplaced. The Farm Bureau and SP Group assertion that evidence that Staff relied upon does not support eminent domain authorization is incorrect. Joint IB, 9. They argue that Staff relies on general data from the Company on the status of negotiations and that Staff Witness, Mr. Maple, does not have any direct knowledge of the negotiations. Joint IB, 9-10. As Mr. Maple has testified, Staff must rely on what is filed in the docket. Staff Ex. 1.0, 16; Tr. 101-102 (Sept. 1, 2015). As a practical matter, it would not be feasible for a Staff witness to contact each individual landowner to gather their opinions, and there is no requirement for Staff to do so.

On the other hand, those stakeholders interested in this proceeding have had an opportunity to file testimony and provide such information for review. They did not do so here. As Mr. Maple has testified, not a single person complained in testimony about poor negotiations. Staff Ex. 1.0, 16; Tr. 101-102 (Sept. 1, 2015.) Moreover, Mr. Maple reiterated on the stand at the evidentiary hearing, that he received few if any phone calls complaining about the negotiations. Tr. 101-102 (Sept. 1, 2015.) For the Farm Bureau and SP Group to now allege, for the first time in briefs, insufficient evidence, when none

of their witnesses testified thereto, is improper and should be disregarded. *See Ameren Illinois Company*, Order, Docket No. 11-0279, at 2, Finding para.3 (Jan. 5, 2012) (recitals of fact and conclusions of law must be supported by the record).

Finally, the Farm Bureau and SP Group also improperly mischaracterize Staff testimony as suggesting there were no deadlines to take into consideration. They state that “[a]s to any particular time pressures [sic], Dakota Access was facing in its Project, Mr. Maple could not recall any deadline.” Joint IB, 9. In fact, when asked at the hearing whether there was a deadline by which Dakota Access needed to have the line built, Mr. Maple said “[t]hey’ve mentioned a deadline. I don’t recall what it is.” Tr. 121:2-3 (Sept. 1, 2015). He explained earlier that “Dakota Access has time constraints on their contracts with shippers, and every day that passes, they get closer to those deadlines. And so the passage of time would be an advantage to the landowners. Certainly, eminent domain authority would be an advantage to the pipeline. Whether or not those things cancel each other out, I don’t know.” Tr. 120:12-20 (Sept. 1, 2015). To the extent that timing concerns are taken into account, the full and proper context should be examined.

Accordingly, the record here supports Section 8-509 authorization on the condition that Dakota Access is able to obtain a Certificate in this docket. Staff Ex. 1.0, 25; Staff IB, 20-24.

## **IX. Conclusion**

WHEREFORE, for the reasons set forth above, Staff respectfully requests that the Commission’s Final Order in the instant proceeding reflect Staff’s recommendations consistent with this Reply Brief, as well as Staff’s Initial Brief and Staff testimony provided

in this proceeding.

Respectfully submitted,

*/s/Christine F. Ericson*

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